IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

EMILIO D., Appellant, v. ARIZONA DEPARTMENT OF ECONOMIC SECURITY and DESTINY D., Appellees.	2 CA-JV 2006-0069 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. 17036800

Honorable Ted B. Borek, Judge

AFFIRMED

Joan Spurney Caplan
Tucson
Attorney for Appellant

Terry Goddard, Arizona Attorney General
By Claudia Acosta Collings
Tucson
Attorneys for Appellee Arizona
Department of Economic Security

V Á S Q U E Z, Judge.

¶1 Emilio D. is the unmarried, biological father of Destiny D., born in June 2005. Emilio appeals from the juvenile court's December 2006 order terminating his parental rights to Destiny after he failed to appear on October 16, 2006, for the initial severance hearing

that had been scheduled in his presence at a continued permanency planning hearing the month before. We affirm.

Facts and Procedural Background

¶2 Viewed in the light most favorable to sustaining the juvenile court's ruling, *Lashonda M. v. Ariz. Dep't of Econ. Sec.*, 210 Ariz. 77, ¶ 13, 107 P.3d 923, 928 (App. 2005), the evidence established that Destiny is the youngest of three children born to Emilio D. and Liza Q. The Arizona Department of Economic Security (ADES) took Destiny's older brothers into protective custody in August 2004, and they were adjudicated dependent as to both parents in October. When Destiny was born eight months later her parents were not then in compliance with their case plans, so ADES took Destiny into custody within days of her birth. She was adjudicated dependent in October 2005 based on both parents' admissions that she was a dependent child.

¶3 Also in October 2005, ADES filed a motion to terminate the parents' rights to Destiny's two brothers. The statutory grounds alleged in that motion were the same for both parents and the same as the grounds later alleged for terminating their rights to Destiny: abuse or neglect, A.R.S. § 8-533(B)(2); mental illness or chronic substance abuse, § 8-533(B)(3); and both nine- and fifteen-month out-of-home placement, § 8-533(B)(8)(a) and (b). In November 2005 and February 2006, the parents executed written relinquishments of their rights to Destiny's brothers, and the juvenile court terminated their parental rights to the boys in February 2006.

¶4 By April 2006, despite reasonable efforts by ADES to provide the parents with appropriate reunification services, Emilio was not fully compliant with his case plan tasks. At a permanency hearing in June, however, the juvenile court found he had come into compliance with his case plan. It thus ratified the concurrent case plan goals of family reunification and severance-and-adoption that had been in place since October 2005 and continued the permanency planning hearing until September.

¶5 Emilio attended the continued permanency hearing on September 20, 2006, at which ADES presented evidence that he had recently relapsed, had tested positive for marijuana and cocaine, and had stopped participating in random urinalysis screenings in late August. He had also stopped attending his weekly therapy appointments and thus had effectively ceased participating in his case plan. As a result, the juvenile court suspended Emilio's visitation rights and changed the case plan goal to severance and adoption. The court directed ADES to file a motion to terminate his rights and admonished him personally to appear for all future court hearings, including the initial severance hearing, which the court scheduled for October 16.

¶6 Emilio did not appear in court on October 16. His attorney was present but did not know why Emilio was not there and did not attempt to show any cause for his client's absence. The juvenile court found Emilio's absence voluntary, in light of his having received personal notice of the hearing and multiple previous admonitions about the consequences of failing to appear, and thus proceeded with the termination adjudication as authorized by Rule 65(C)(6)(c), Ariz. R. P. Juv. Ct., 17B A.R.S.

¶7 Besides receiving in evidence two written reports prepared by the ongoing case manager, the court heard testimony from the case manager's supervisor that he had reviewed, approved, and signed the two reports. The supervisor further testified that severing Emilio's parental rights was in Destiny's best interest because Emilio was no longer complying with his case plan, had again been testing positive for drug use, and had not visited with Destiny in thirty days, while Destiny remained in the same potential adoptive home in which she had spent nearly all sixteen months of her life. The court found the allegations of the motion for termination had been established by clear and convincing evidence and further found that terminating Emilio's rights was in Destiny's best interest.

¶8 Three days later, Emilio filed a motion to set aside default, claiming he had inadvertently miscalendared the initial severance hearing and thus had appeared for it one day late. He asked the juvenile court to set aside its order of October 16, 2006, and to reschedule the initial severance hearing. At a hearing in early December, the juvenile court denied Emilio's motion and entered a formal written order terminating his parental rights to Destiny.

Legal Issues and Analysis

¶9 Of the three issues Emilio raises on appeal, we consider his last claim first. In it, Emilio contends the juvenile court abused its discretion and violated his right to due process by refusing to set aside its order terminating his parental rights, entered when he mistakenly failed to appear for the initial severance hearing. He acknowledges that his "faulty memory and calendaring error" might not constitute excusable neglect in other legal

contexts but claims the court's ruling in his absence was too harsh a sanction when his fundamental right to parent his child was at stake.

¶10 Rule 65(C)(6)(c), Ariz. R. P. Juv. Ct., permits a juvenile court to proceed by what is commonly called a default if a parent fails to appear at an initial termination hearing, provided the parent was properly served, had actual notice of the hearing, and had been admonished about the consequences of failing to appear.[1] The court may order termination of the absent parent's rights "based upon the record and evidence presented if the moving party or petitioner has proven grounds upon which to terminate parental rights." *Id.*; *see also* Ariz. R. P. Juv. Ct. 64(C), 17B A.R.S.; A.R.S. § 8-863(C); *Adrian E. v. Ariz. Dep't of Econ. Sec.*, 215 Ariz. 96, n.3, 158 P.3d 225, 227 n.3 (App. 2007).

¶11 Once the termination order was entered, it could only be set aside pursuant to Rule 46(E), Ariz. R. P. Juv. Ct., 17B A.R.S., which provides that "[a] motion to set aside a judgment rendered by the court shall conform to the requirements of Rule 60(c), Ariz. R. Civ. P., [16 A.R.S., Pt. 2.]" Rule 60(c) permits a court to relieve a party from the effect of a final judgment for certain specified reasons, including mistake, inadvertence, surprise, excusable neglect, newly discovered evidence, and fraud. Under any of those grounds, the moving party must also show that he or she acted promptly in seeking relief "and that a meritorious claim or defense existed." *Jepson v. New*, 164 Ariz. 265, 273, 792 P.2d 728, 736 (1990).

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[1]Emilio does not claim he lacked notice of the hearing or failed to understand the potential consequences of failing to attend. He challenges only the reasonableness of the juvenile court's refusal to set aside the order it entered in his absence on October 16.

¶12 We review the denial of a Rule 60(c) motion for relief from judgment for an abuse of discretion. *See City of Phoenix v. Geyler*, 144 Ariz. 323, 328, 697 P.2d 1073, 1078 (1985). Likewise, the determination whether a party has shown good cause for failing to appear similarly rests in the juvenile court's discretion. *Adrian E.*, 215 Ariz. 96, ¶ 15, 158 P.3d at 230; *John C. v. Sargeant*, 208 Ariz. 44, ¶ 13, 90 P.3d 781, 784 (App. 2004). On review, we will rarely reverse unless the juvenile court's discretion was "'manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.'" *Lashonda M. v. Ariz. Dep't of Econ. Sec.*, 210 Ariz. 77, ¶ 19, 107 P.3d 923, 929 (App. 2005), *quoting Quigley v. Tucson City Court*, 132 Ariz. 35, 37, 643 P.2d 738, 740 (App. 1982).

¶13 We do not find the juvenile court's refusal to set aside its termination order manifestly unreasonable simply because the stakes were high. Given Destiny's competing interests in achieving stability, permanency, and a prompt judicial determination of her future, we cannot say the court abused its discretion in tacitly finding that, after Emilio had lost "his court paperwork" following the September 20 hearing and then allegedly relied on his faulty memory instead of confirming the date and time of the hearing with his attorney, Emilio had failed to show excusable neglect or good cause for failing to appear for the initial termination hearing.

¶14 Moreover, as the state notes, although Emilio "believe[d] he ha[d] participated in his case plan tasks," he did not demonstrate that he had a genuinely meritorious defense to the motion for termination. *See Jepson*, 164 Ariz. at 273, 792 P.2d at 736. Evidence presented in September showed he had recently relapsed and had lost his right to visitation

with Destiny. And his relapse occurred after he had received rehabilitative services for more than two years following the removal of his two older children in August 2004 due, in part, to his abuse of alcohol and drugs. In short, the juvenile court did not clearly abuse its discretion in denying Emilio's motion.

¶15 In his two remaining issues, Emilio contends there was no reasonable evidence to support any of the statutory grounds for severance alleged in the motion for termination or to support the juvenile court's finding that severing Emilio's rights was in Destiny's best interests. We find merit to neither claim.[2]

¶16 Emilio's assertion that there was no evidentiary support for finding any grounds for termination rests on his belief that two written reports—a permanency report dated June 13, 2006, and an addendum dated September 13, 2006—were never admitted

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[2]Although ADES argues Emilio waived these issues by failing to object below, in the exercise of our discretion we address his claims of insufficient evidence on their merits. We do so, in part, to insure that—despite Emilio's absence from the hearing at which his rights were terminated—there was clear evidence in the record proving the existence of one or more statutory grounds for severance. *See* A.R.S. § 8-863(C) ("The court may terminate the parent-child relationship as to a parent who does not appear [at an initial termination hearing] based on the record and evidence presented as provided in rules prescribed by the supreme court."); Ariz. R. P. Juv. Ct. 65(C)(6)(c) ("[T]he court may proceed with the adjudication of termination based upon the record and evidence presented if the moving party or petitioner has proven grounds upon which to terminate parental rights."). To have ordered the termination of Emilio's rights in the absence of such evidence would, we believe, constitute fundamental, prejudicial error that failure to object would not have waived. *See State v. Bible*, 175 Ariz. 549, 572, 858 P.2d 1152, 1175 (1993) (clear, egregious error that only new trial could cure raisable on appeal despite lack of prior objection); *Monica C. v. Ariz. Dep't of Econ. Sec.*, 211 Ariz. 89, ¶ 23, 118 P.3d 37, 42 (App. 2005) (although sparingly applied in civil cases, doctrine of fundamental error may properly be invoked in actions to terminate parents' fundamental liberty interests in care, custody, and control of their children).

in evidence on October 16. But the documents themselves, marked "pet[itioner]'s" exhibits 1 and 2, reflect that both were identified and admitted at the hearing on that date. The minute entry from the hearing similarly recites that both exhibits were identified and admitted in evidence without objection, and the exhibit list from the hearing also reflects their admission.

¶17 The transcript of the hearing, however, contains what appears to be either an error by the court reporter or a simple misstatement by the juvenile court that occurred during the following exchange among the court and counsel:

> [Counsel for ADES]: The parties are not here and they were admonished last time in court on September 20, 2006.
>
> I would ask the Court to proceed to sever the parental rights as to Destiny D[.] . . . based on the motion to terminate parental rights and based on the permanency report dated June 13, 2006[,] and the addendum to that report dated September 13, 2006.
>
> I have marked those reports as petitioner's 1 and 2, in support of the grounds for severance and I move admission of those reports.
>
> THE COURT: You said June 13?
>
> [Counsel for ADES]: Yes, I believe so. That was the original report.
>
> THE COURT: 6-13-06 and 10-2. [sic] Is there any objection?
>
> [Counsel for Destiny]: No objection.
>
> [Counsel for the mother]: No objection.
>
> [Counsel for Emilio]: No objection.

THE COURT: They are marked as petitioner's 1 and 2.

Because the reports had already been identified or "marked" by the clerk at the request of counsel for ADES, the only reasonable interpretation of the court's statement is that it simply misspoke, stating the exhibits were "marked" when it meant to say "admitted." As we have noted, the minute entry and exhibit list from the hearing and the exhibits themselves all suggest the exhibits were indeed admitted.

¶18 Emilio concedes the two reports "could have . . . established" grounds for termination, had they been in evidence. Because three of four written indicators, plus logic and reason, support the conclusion that they were in fact admitted, we reject Emilio's argument that the court's findings lacked any evidentiary support. Moreover, as the state notes, the two reports had previously been admitted in evidence at the hearings on June 28 and September 20 in any event. As a result, they were already part of the record and available for the court's consideration on October 16 when it proceeded in Emilio's absence pursuant to Rule 65(C)(6)(c). *See Adrian E.*, 215 Ariz. 96, ¶ 23, 158 P.3d at 231 (when conducting "default hearing," juvenile court can consider exhibits admitted in previous dependency hearings).

¶19 Finally, Emilio contends there was no reasonable evidence to support the juvenile court's finding that terminating his parental rights was in Destiny's best interest. He claims the testimony of the ongoing case manager's supervisor, to which counsel for Emilio interposed no objection, lacked foundation and was inadmissible as hearsay and as opinion testimony by a lay witness. Even apart from those objections, Emilio asserts the

supervisor's testimony did not supply sufficient facts to support the court's best-interest finding.

¶20 That terminating a parent's rights will serve the best interests of a child "may be established by either showing an affirmative benefit to the child by removal or a detriment to the child by continuing in the relationship." *Jennifer B. v. Ariz. Dep't of Econ. Sec.*, 189 Ariz. 553, 557, 944 P.2d 68, 72 (App. 1997). Freeing a child for adoption when a current adoptive placement exists is one example of a benefit to the child resulting from severance. *See In re Maricopa County Juvenile Action No. JS-500274*, 167 Ariz. 1, 6, 804 P.2d 730, 735 (1990). In assessing a child's best interests, a juvenile court may also consider whether the child's needs are currently being met by someone other than the parent. *See In re Maricopa County Juvenile Action No. JS-8490*, 179 Ariz. 102, 107, 876 P.2d 1137, 1142 (1994) (evidence that foster parents, not natural parents, were meeting child's needs material to both statutory ground of abandonment and issue of child's best interest).

¶21 The record does not substantiate Emilio's claim. In the September addendum report to the juvenile court, the ongoing case manager detailed Emilio's positive drug tests during June, July, and August 2006, and wrote:

> Given the recent developments regarding the father's progress, this Case Manager must make a new recommendation for the case plan goal to be changed from a concurrent plan of family reunification with severance and adoption to severance and adoption only. The father has been participating in substance abuse treatment for over 2 years and he has not benefit[t]ed from this service. Destiny has now been in out-of-home care for 15 months, from 6/17/05, when she was released from the hospital, to the present. Destiny is placed in a licensed foster-adopt home with loving, nurturing caregivers who can

> provide for her needs and are willing to adopt her. This Case Manager believes that severance and adoption [are] in the best interest of the child.

The case manager's report, whose contents were uncontroverted, provided reasonable evidence to support the court's finding that severing Emilio's rights was in Destiny's best interest. *See generally Audra T. v. Ariz. Dep't of Econ. Sec.*, 194 Ariz. 376, ¶ 2, 982 P.2d 1290, 1291 (App. 1998) (reviewing court will not disturb juvenile court's ruling unless there is no evidence to support its factual findings or it reached erroneous legal conclusion).

¶22 Finding no merit to Emilio's contentions on appeal and no reversible error, we affirm the juvenile court's order terminating Emilio's parental rights to Destiny.

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GARYE L. VÁSQUEZ, Judge

CONCURRING:

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PETER J. ECKERSTROM, Presiding Judge

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PHILIP G. ESPINOSA, Judge